

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 15

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAVID L. COVINGTON and RICHARD H. BELL

Appeal No. 97-0115
Application 08/220,341¹

ON BRIEF

Before McCANDLISH, Senior Administrative Patent Judge, and
MEISTER and McQUADE, Administrative Patent Judges.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

This appeal is from the final rejection of claims 1 through 17, all of the claims pending in the application.

The invention relates to "gowns and other garments and particularly to surgical gowns" (specification, page 2).

Claims 1 and 4 are illustrative and read as follows:

¹ Application for patent filed March 30, 1994.

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1. A surgical gown defining an opening adapted to receive an individual's neck, the gown comprising:

opposed back panels having non-parallel side edges defining a slit having a length extending from the opening to a bottom edge of the gown; and wherein

the opposed panels are adapted, when the gown is in use, to overlap along the entire length of the slit.

4. A garment blank comprising:

a center part;

a first part having a pair of side edges spaced apart by a bottom edge;

a second part having a pair of side edges spaced apart by an upper edge wherein portions of the second part define a slit, and wherein the second part is adapted to overly the back of the wearer; and

wherein the first and second parts are joined to the center part and wherein the length of the upper edge of the second part is greater than the length of the bottom edge of the first part.

The references relied upon by the examiner as evidence of obviousness are:

Coven	2,528,340	Oct. 31, 1950
Artzt	3,078,467	Feb. 26, 1963
Zimmon	3,353,189	Nov. 21, 1967
Brock et al. (Brock)	4,041,203	Aug. 9, 1977
Harreld et al. (Harreld)	4,829,602	May 16, 1989

The appealed claims stand rejected under 35 U.S.C. § 103 as follows:²

a) claims 1 through 8, 10 through 14 and 17 as being unpatentable over Artzt in view of Coven and Zimmon;

b) claim 9 as being unpatentable over Artzt in view of Coven and Zimmon, and further in view of Harreld; and

c) claims 15 and 16 as being unpatentable over Artzt in view of Coven and Zimmon, and further in view of Brock.

Reference is made to the appellants' brief (Paper No. 10) and to the examiner's answer (Paper No. 12) for the respective positions of the appellants and the examiner with regard to the propriety of these rejections.

Artzt "relates generally to wearing apparel and is particularly directed to improvements in garments, such as, T-shirts, polo-shirts, pajama tops and the like, and to improved methods of making such garments" (column 1, lines 7 through 10). Figures 2 and 3 respectively illustrate a blank and a garment made from the blank. The blank 12a is cut from

² Upon reconsideration, the examiner has withdrawn the 35 U.S.C. § 112, second paragraph, rejection of claims 7 and 8 which was set forth in the final rejection (see page 7 in the examiner's answer).

a flattened tube 10 of material and includes a back-forming portion 22a, a front-forming portion 20a, a neck opening 60a, and laterally extending sleeve-forming portions 18a. The front-forming portion 20a is divided into two equal sections by a cut 66 extending from the neck opening 60a to the bottom edge 54a of the front-forming portion. The blank is formed into a garment by folding it along the medial lines 28a of the sleeve-forming portions 18a and stitching together the edges at the sides of the back and front and at the bottom of the sleeves. As explained by Artzt,

[s]ince the side edges 36a of the back forming portion 22a of the blank 12a converge toward the end edge 52a which forms the bottom of the garment at the back thereof, and since the two divided parts of the front forming portion 20a of the blank are of uniform width from the top to the bottom thereof, but have their outside edges 34a stitched to the converging edges 36a in the completed garment, it will be apparent that the edges 66a and 66b of the front forming portion extending along the cut 66 tend to overlap in the completed garment, as shown in FIG. 3 [column 5, lines 33 through 43].

Coven discloses a hospital garment

which is constructed to provide a front 6 and combined side and back sections 7 secured to the vertical edges of the front 6 by conventional stitched seams 8, the outer side edges of the combined side and back sections 7 overlapping at the rear of the garment to provide a double thickness of

material substantially throughout the entire area of the back [column 1, lines 42 through 50].

Zimmon discloses a hospital gown which can be made as a front-opening garment (see, for example, Figure 1) or as a rear-opening garment (see, for example, Figure 6).

Harreld discloses a hospital gown made from a blank having slits near each of its side edges to form a pair of integral tie straps 16 (see Figure 1).

Brock discloses a non-woven garment material having a number of desirable characteristics such as a textile-like appearance, a desirable drape, strength, a comfortable feel, abrasion-resistance and water-repellency (see column 1).

The threshold issue in this appeal is whether Artzt, the primary reference in each of the appealed rejections, is non-analogous art with respect to the claimed invention as argued by the appellants (see pages 7 through 10 in the brief), and thus is too remote to be treated as prior art in determining the obviousness of the claimed invention.

Prior art is analogous if it is within the field of the inventor's endeavor or is reasonably pertinent to the

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particular problem with which the inventor was involved. In re Clay, 966 F.2d 656, 659, 23 USPQ2d 1058, 1060-61 (Fed. Cir. 1992).

On page 2 of their specification, the appellants state that

[t]his invention relates to gowns and other garments and particularly to surgical gowns and methods for making the same. More particularly, this invention relates to improved gown assembly techniques, the use thereof providing improved barrier protection and material utilization.

Artzt, described above, is squarely within the appellant's general "gowns and other garments" field of endeavor, and is reasonably pertinent to the particular problem of "gown assembly techniques . . . providing improved . . . material utilization" with which the appellants were involved. Thus, Artzt is analogous art which was properly considered by the examiner in evaluating the obviousness of the subject matter on appeal.

With regard to the standing rejection of independent claims 1 and 12, the appellants argue that Artzt does not meet

the surgical gown, back panel and back panel overlap limitations in these claims (see page 7 in the brief). These limitations have both structural and intended use aspects. The structural aspects are met by the Artzt garment which has an identical overlapping panel construction and certainly qualifies as a "gown" under the ordinary and accustomed meaning of this word. The intended use aspects of the limitations set forth the environment and the manner in which the claimed gown is intended to be used. Although the Artzt garment is not disclosed as being used as a surgical gown or with its overlapping panels at the wearer's back, it is not apparent why this garment is not inherently capable, without change, of such use. In this regard, the use for which a prior art device is intended is irrelevant if it could be employed, without change, for the purpose claimed. See LaBounty Manufacturing Inc. v. U.S. International Trade Commission, 958 F.2d 1066, 1075, 22 USPQ2d 1025, 1032 (Fed. Cir. 1992).

In a related vein, the appellants argue (see pages 7, 10 and 11 in the brief) that the teachings of Artzt, Coven and Zimmon do not support the examiner's conclusion that "[i]t

would have been obvious to one of ordinary skill in the art to alternatively wear the garment with the slit toward the front or rear as shown by the above three references depending on the preference of the wearer and to accommodate the wearer's desires" (answer, page 5). The teachings of Coven and Zimmon, however, would have conveyed to the artisan that garments of the type disclosed by Artzt may be worn with their overlapping panels at the wearer's back. We would also note in passing that it is not apparent how the gown set forth in independent claims 1 and 12 differs from the garment disclosed by Coven.

With regard to the standing rejection of independent claim 4, the appellants contend (see pages 5 and 6 in the answer) that Artzt does not meet the claim limitation reciting that "the length of the upper edge of the second part is greater than the length of the bottom edge of the first part." As shown in Exhibit 1 appended to the appellants' brief, however, the length of edge 54a on Artzt's garment blank is greater than the length of edge 52a. For reasons similar to those discussed above in connection with the intended use aspects of the appealed claims, Artzt's edge 54a can be

considered as the upper edge of the second part of the blank and edge 52a as the bottom edge of the first part.

As for claim 11 which depends from claim 4, both side edges of such second part of Artzt's blank extend inwardly from such upper edge to the center part of the blank in the sense that they extend from one end of the blank "inwardly" toward the center of the blank. Thus, the appellants' argument that Artzt does not disclose this feature is not well taken (see page 7 in the brief).³

With regard to the standing rejection of claims 15 and 16, which depend from claim 12, the appellants' argument that "there is no motivation to make the Artzt garment out of any material potentially described in Brock" (brief, page 12) is not persuasive. The desirable characteristics attributed by Brock to the material disclosed therein would have provided

³ The appellants' additional argument that the rejection of claim 11 should be reversed on procedural grounds because the examiner did not specifically discuss claim 11 in the final rejection (see page 6 in the brief) is also unconvincing. Any such "procedural" oversight in the final rejection was rectified by the examiner in the answer (see page 8).

the artisan with ample motivation or suggestion to use such material to make the garment disclosed by Artzt.⁴

In light of the foregoing, the argued differences between the subject matter recited in claims 1, 4, 11, 12, 15 and 16 and the prior art are such that the subject matter as a whole would have been obvious to a person having ordinary skill in the art at the time the invention was made. Therefore, we shall sustain the standing 35 U.S.C. § 103 rejections of these claims.

We shall also sustain the standing 35 U.S.C. § 103 rejections of dependent claims 2, 3, 5 through 8, 10, 13, 14 and 17 since the appellants have not argued such with any reasonable specificity, thereby allowing these claims to stand or fall with the claims from which they depend (see In re Nielson, 816 F.2d 1567, 1572, 2 USPQ2d 1525, 1528 (Fed. Cir. 1987)).

We shall not sustain, however, the standing 35 U.S.C. § 103 rejection of claim 9. Although Harreld discloses a blank

⁴ In claims 15 and 16, the term "the material" lacks a proper antecedent basis. This informality is deserving of correction in the event of further prosecution before the examiner.

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having slits near each of its side edges to form integral tie straps, such slits do not extend from the bottom edge of a first part of the blank and terminate in the center part of the blank as recited in claim 9. Thus, Harreld would not have suggested modifying the Artzt blank so as to arrive at the specific side edge slit construction specified in claim 9.

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In summary and for the above reasons, the decision of the examiner to reject claims 1 through 17 under 35 U.S.C. § 103 is affirmed with respect to claims 1 through 8 and 10 through 17 and reversed with respect to claim 9.

AFFIRMED-IN-PART

HARRISON E. McCANDLISH, Senior)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
JAMES M. MEISTER)	APPEALS
Administrative Patent Judge)	AND
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McQUADE

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APJ McQUADE

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Senior APJ McCANDLISH

PART

DECISION: **AFFIRMED-IN-**

Typed By: Jenine Gillis

DRAFT TYPED: 20 Oct 00

FINAL TYPED: